

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LITTLE,

Defendant-Appellant.

UNPUBLISHED

January 24, 2003

No. 234057

Oakland Circuit Court

LC No. 00-172713-FC

Before: Smolenski, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendant was charged with assault with intent to murder, MCL 750.83, and felony-firearm, MCL 750.227b. Following a jury trial, defendant was convicted of the lesser-included offense of assault with intent to do great bodily harm, MCL 750.84, and felony-firearm. Defendant was sentenced to 36 months' to ten years' imprisonment on the assault with intent to do great bodily harm conviction, with credit for 323 days served, and two years' imprisonment on the felony-firearm conviction, to be served consecutively. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court abused its discretion in not granting defendant's motion to dismiss after it determined on December 12, 2000, that the prosecution had not established due diligence in locating its missing witnesses. We disagree.

The purpose of the due diligence hearing in this case was to determine if the witnesses were legally unavailable. A witness may be declared unavailable, and his prior testimony used as substantive evidence at trial, when the prosecution shows that diligent efforts have been made to produce the absent witness. *People v Bean*, 457 Mich 677, 683-684; 580 NW2d 390 (1988). The prosecution was seeking to admit two witnesses' preliminary examination testimony in lieu of their testimony at trial pursuant to MRE 804(b)(1), and because the third witness did not testify at the preliminary examination, the prosecution was requesting a jury instruction that no negative inference be drawn from his absence. The effect of the court's due diligence ruling was to require the prosecution to produce the witnesses for trial on December 14, 2000, or forego their testimony, not to dismiss the case. *Bean*, *supra* at 682-683. Defendant cites no law to support his contention that dismissal was the proper remedy. Therefore, the trial court did not err in denying defendant's motion to dismiss.

It seems what defendant is actually trying to argue is that the trial court abused its discretion in granting the December 14, 2000 adjournment in light of its lack of due diligence determination on December 12, 2000. A trial court's decision whether to grant an adjournment is reviewed for an abuse of discretion. MCR 2.503(D)(1); *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). The burden of proof falls on defendant. *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993).

MCR 2.503(C) governs the granting of adjournments on the basis of the unavailability of a witness or evidence, and provides, in part, that an adjournment may only be granted “if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.” It appears from the record that the parties met in court on December 14, 2000, and the court granted the adjournment in open court. However, defendant failed to provide us with a transcript of this proceeding, and, thus, has abandoned review of this issue. *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995) (failure to provide this court with the relevant transcript constitutes waiver of review of the issue because “an appellate court is unable to review the party’s objection and the trial court’s reason for the decision”).

Even if we were to assume that the court granted the adjournment because the prosecution was still unable to locate the witnesses and found that the prosecution had made diligent efforts to locate the witnesses, defendant cites no authority to establish that the contrary diligence findings are logically inconsistent. Because one due diligence ruling significantly impacts defendant’s constitutional rights at trial and the other only relates to a delay in trial, different standards are not inherently inconsistent. Therefore, defendant has also abandoned the issue for failure to properly present his argument and cite supporting case law. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

Defendant next argues that the court erred in admitting photographs of the victim’s injuries because they were not material, unfairly prejudicial, and cumulative. Again, we disagree. The admission of photographs is reviewed on appeal for an abuse of discretion. *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998).

Defendant first asserts that the photographs had no probative value because they were not relevant. However, defendant was charged with assault with intent to murder. Thus, the degree of harm intended was at issue. MCL 750.83; *People v Mills*, 450 Mich 61, 71; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995). Evidence of injury is admissible to show intent to kill. *Mills, supra* at 71. Also, the extent of a victim’s injuries is relevant to establish intent. *Id.* In this case, the jury had to determine, if they believed defendant was the shooter, whether he intended to murder, do great bodily harm, or commit felonious assault. Both photographs showed the extent of the victim’s injuries; one photograph showed the amount of bandaging required to cover the wound, and the other depicted the wound itself.

Additionally, the photographs’ relevancy did not dissipate simply because the victim testified about his injuries and showed the jury his healed hand. Photographs are not excludable from evidence just because a witness can orally testify about the information contained in the photographs. *Id.* at 76. Photographs may also be used to corroborate testimony, to aid the jury in assessing a witness’ credibility, i.e., whether he is testifying truthfully and accurately. *Id.* at 72, 76. Therefore, we conclude that the photographs were relevant and material to establishing the elements of the offense and witness credibility. *Id.* at 69.

Defendant also asserts that the photographs were inadmissible under MRE 403. Relevant evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice” or its needlessly cumulative. MRE 403. Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 69 NW2d 801 (2002).

The admission of gruesome photographs for the purpose of arousing the sympathies or prejudices of the jury is improper, but a photograph which is otherwise admissible is not rendered inadmissible because it depicts a gruesome or shocking crime. *Mills, supra* at 77 (citation omitted). In this case, the court limited the photographs’ admission to black and white form which muted their graphic nature. Also, the photographs were accurate representations of the harm inflicted upon the victim. The trial court did not abuse its discretion in determining that the probative value of the photographs were not substantially outweighed by unfair prejudice. *Id.* at 76.

Furthermore, we fail to see how the photographs were cumulative. Defendant bases his argument on the fact that the prosecution called the victim and others who were at the scene. However, none of these witnesses described the exact nature of the wound. The victim stated that his hand required surgery and the other witnesses testified that they saw the victim’s hand bleeding. We find that the trial court did not abuse its discretion in admitting the photographs.

Lastly, defendant argues that the trial court erred in allowing the late endorsement of the prosecution’s rebuttal witnesses. We disagree. A trial court’s decision to allow the late endorsement of a witness by the prosecutor is reviewed for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 32-33; 592 NW2d 75 (1998).

Defendant does not contend that the witnesses’ testimony was not proper rebuttal, but only that the court erred in allowing them to testify because defendant had no notice of them given that they were not listed on the prosecution’s witness list. The prosecutor may add to or delete from his witness list at any time upon leave of the court and for good cause shown or by stipulation of the parties. MCL 767.40a(4).

The prosecutor asserted that he did not know that one of the witnesses would change her testimony on the day of trial. Defendant presents no evidence that the prosecutor was aware before the witness testified that she intended to change her testimony. In fact, the witness testified that she told no one before the trial that she had perjured herself at the preliminary examination. Thus, the prosecutor had good cause for the late endorsement of the rebuttal witnesses. *People v Kulick*, 209 Mich App 258, 265; 530 NW2d 163, remanded for reconsideration on other grounds 449 Mich 851 (1995). Under the circumstances, we conclude that the trial court did not abuse its discretion in allowing the late endorsement of the rebuttal witnesses.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Bill Schuette